

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SMUGMUG, INC.,)	Case No. C 09-CV-02255 CW
)	
Plaintiff,)	AMENDED STIPULATED PROTECTIVE
)	ORDER
vs.)	
)	
VIRTUAL PHOTO STORE LLC, dba VPS,)	
LLC,)	
)	
Defendant.)	

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation would be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords extends only to the limited information or items that are entitled under the applicable legal principles to treatment as confidential. The parties further acknowledge, as set forth in Section 10, below, that this Stipulated Protective Order creates no entitlement to file confidential information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and reflects the standards that will be applied when a party seeks permission from the court to file material under seal.

Amended Stipulated Protective Order
Case No. 09-cv-02255 CW

1 2.11 Counsel (without qualifier): Outside Counsel and House Counsel (as well as
2 their support staffs).

3 2.12 Expert: a person with specialized knowledge or experience in a matter
4 pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert
5 witness or as a consultant in this action and who is not a past or a current employee of a Party or of a
6 competitor of a Party's and who, at the time of retention, is not anticipated to become an employee of
7 a Party or a competitor of a Party's. This definition includes a professional jury or trial consultant
8 retained in connection with this litigation.

9 2.13 Professional Vendors: persons or entities that provide litigation support
10 services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations;
11 organizing, storing, retrieving data in any form or medium; etc.) and their employees and
12 subcontractors.

13
14 3. SCOPE

15 The protections conferred by this Stipulation and Order cover not only Protected Material (as
16 defined above), but also any information copied or extracted therefrom, as well as all copies,
17 excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by
18 parties or counsel to or in court or in other settings that might reveal Protected Material.

19
20 4. DURATION

21 Even after the termination of this litigation, the confidentiality obligations imposed by this
22 Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order
23 otherwise directs.

24
25 5. DESIGNATING PROTECTED MATERIAL

26 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each
27 Party or non-party that designates information or items for protection under this Order must take
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1 care to limit any such designation to specific material that qualifies under the appropriate standards.
2 A Designating Party must take care to designate for protection only those parts of material,
3 documents, items, or oral or written communications that qualify — so that other portions of the
4 material, documents, items, or communications for which protection is not warranted are not swept
5 unjustifiably within the ambit of this Order.

6 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
7 shown to be clearly unjustified, or that have been made for an improper purpose (e.g., to
8 unnecessarily encumber or retard the case development process, or to impose unnecessary expenses
9 and burdens on other parties), expose the Designating Party to sanctions.

10 If it comes to a Party's or a non-party's attention that information or items that it
11 designated for protection do not qualify for protection at all, or do not qualify for the level of
12 protection initially asserted, that Party or non-party must promptly notify all other parties that it is
13 withdrawing the mistaken designation.

14 5.2 Manner and Timing of Designations. Except as otherwise provided in this
15 Order (see, e.g., second paragraph of section 5.2(a), below), or as otherwise stipulated or ordered,
16 material that qualifies for protection under this Order must be clearly so designated before the
17 material is disclosed or produced.

18 Designation in conformity with this Order requires:

19 (a) for information in documentary form (apart from transcripts of
20 depositions or other pretrial or trial proceedings), that the Producing Party affix the legend
21 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL — ATTORNEYS' EYES ONLY" at the top of
22 each page that contains protected material. If only a portion or portions of the material on a page
23 qualifies for protection, the Producing Party also must clearly identify the protected portion(s) (e.g.,
24 by making appropriate markings in the margins) and must specify, for each portion, the level of
25 protection being asserted (either "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL -
26 ATTORNEYS' EYES ONLY").

1 A Party or non-party that makes original documents or materials available for
2 inspection need not designate them for protection until after the inspecting Party has indicated which
3 material it would like copied and produced. During the inspection and before the designation, all of
4 the material made available for inspection shall be deemed "HIGHLY CONFIDENTIAL -
5 ATTORNEYS' EYES ONLY." After the inspecting Party has identified the documents it wants
6 copied and produced, the Producing Party must determine which documents, or portions thereof,
7 qualify for protection under this Order, then, before producing the specified documents, the
8 Producing Party must affix the appropriate legend ("CONFIDENTIAL" or "HIGHLY
9 CONFIDENTIAL -- ATTORNEYS' EYES ONLY") at the top of each page that contains Protected
10 Material. If only a portion or portions of the material on a page qualifies for protection, the
11 Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate
12 markings in the margins) and must specify, for each portion, the level of protection being asserted
13 (either "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL — ATTORNEYS' EYES ONLY").

14 (b) for testimony given in deposition or in other pretrial or trial proceedings,
15 that the Party or non-party offering or sponsoring the testimony identify on the record, before the
16 close of the deposition, hearing, or other proceeding, all protected testimony, and further specify any
17 portions of the testimony that qualify as "HIGHLY CONFIDENTIAL — ATTORNEYS' EYES
18 ONLY." When it is impractical to identify separately each portion of testimony that is entitled to
19 protection, and when it appears that substantial portions of the testimony may qualify for protection,
20 the Party or non-party that sponsors, offers, or gives the testimony may invoke on the record (before
21 the deposition or proceeding is concluded) a right to have up to 20 days to identify the specific
22 portions of the testimony as to which protection is sought and to specify the level of protection being
23 asserted ("CONFIDENTIAL" or "HIGHLY CONFIDENTIAL — ATTORNEYS' EYES ONLY").
24 Only those portions of the testimony that are appropriately designated for protection within the 20
25 days shall be covered by the provisions of this Stipulated Protective Order.

26 Transcript pages containing Protected Material must be separately bound by
27 the court reporter, who must affix to the top of each such page the legend "CONFIDENTIAL" or
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"HIGHLY CONFIDENTIAL — ATTORNEYS' EYES ONLY," as instructed by the Party or nonparty offering or sponsoring the witness or presenting the testimony.

(c) for information produced in some form other than documentary, and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the container or containers in which the information or item is stored the legend "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL — ATTORNEYS' EYES ONLY." If only portions of the information or item warrant protection, the Producing Party, to the extent practicable, shall identify the protected portions, specifying whether they qualify as "Confidential" or as "Highly Confidential — Attorneys' Eyes Only."

5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items as "Confidential" or "Highly Confidential — Attorneys' Eyes Only" does not, standing alone, waive the Designating Party's right to secure protection under this Order for such material. If material is appropriately designated as "Confidential" or "Highly Confidential — Attorneys' Eyes Only" after the material was initially produced, the Receiving Party, on timely notification of the designation, must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

6.1 Timing of Challenges. Unless a prompt challenge to a Designating Party's confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary economic burdens, or a later significant disruption or delay of the litigation, a Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2 Meet and Confer. A Party that elects to initiate a challenge to a Designating Party's confidentiality designation must do so in good faith and must begin the process by conferring directly (in voice to voice dialogue; other forms of communication are not sufficient) with counsel for the Designating Party. In conferring, the challenging Party must explain the basis for its belief

1 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
2 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may
3 disclose any information or item designated CONFIDENTIAL only to:

4 (a) the Receiving Party's Outside Counsel of record in this action, as well as
5 employees of said Counsel to whom it is reasonably necessary to disclose the information for this
6 litigation and who have signed the "Agreement to Be Bound by Protective Order" that is attached
7 hereto as Exhibit A;

8 (b) the officers, directors, and employees (including House Counsel) of the
9 Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed
10 the "Agreement to Be Bound by Protective Order" (Exhibit A);

11 (c) experts (as defined in this Order) of the Receiving Party to whom
12 disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be
13 Bound by Protective Order" (Exhibit A);

14 (d) the Court and its personnel;

15 (e) court reporters, their staffs, and professional vendors to whom disclosure
16 is reasonably necessary for this litigation and who have signed the "Agreement to Be Bound by
17 Protective Order" (Exhibit A);

18 (f) during their depositions, witnesses in the action to whom disclosure is
19 reasonably necessary and who have signed the "Agreement to Be Bound by Protective Order"
20 (Exhibit A). Pages of transcribed deposition testimony or exhibits to depositions that reveal
21 Protected Material must be separately bound by the court reporter and may not be disclosed to
22 anyone except as permitted under this Stipulated Protective Order.

23 (g) the author of the document or the original source of the information.

24 7.3 Disclosure of "HIGHLY CONFIDENTIAL — ATTORNEYS' EYES ONLY"
25 Information or Items. Unless otherwise ordered by the court or permitted in writing by the
26 Designating Party, a Receiving Party may disclose any information or item designated "HIGHLY
27 CONFIDENTIAL — ATTORNEYS' EYES ONLY" only to:

(a) the Receiving Party's Outside Counsel of record in this action, as well as employees of said Counsel to whom it is reasonably necessary to disclose the information for this litigation and who have signed the "Agreement to Be Bound by Protective Order" that is attached hereto as Exhibit A;

(b) Experts (as defined in this Order) (1) to whom disclosure is reasonably necessary for this litigation, (2) who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A);

(c) the Court and its personnel;

(d) court reporters, their staffs, and professional vendors to whom disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A); and

(e) the author of the document or the original source of the information.

8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION.

If a Receiving Party is served with a subpoena or an order issued in other litigation that would compel disclosure of any information or items designated in this action as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL — ATTORNEYS' EYES ONLY," the Receiving Party must so notify the Designating Party, in writing (by fax, if possible) immediately and in no event more than three court days after receiving the subpoena or order. Such notification must include a copy of the subpoena or court order.

The Receiving Party also must immediately inform in writing the Party who caused the subpoena or order to issue in the other litigation that some or all the material covered by the subpoena or order is the subject of this Protective Order. In addition, the Receiving Party must deliver a copy of this Stipulated Protective Order promptly to the Party in the other action that caused the subpoena or order to issue.

1 The purpose of imposing these duties is to alert the interested parties to the existence of this
2 Protective Order and to afford the Designating Party in this case an opportunity to try to protect its
3 confidentiality interests in the court from which the subpoena or order issued. The Designating Party
4 shall bear the burdens and the expenses of seeking protection in that court of its confidential material
5 — and nothing in these provisions should be construed as authorizing or encouraging a Receiving
6 Party in this action to disobey a lawful directive from another court.

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8 9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

9 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected
10 Material to any person or in any circumstance not authorized under this Stipulated Protective Order,
11 the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized
12 disclosures, (b) use its best efforts to retrieve all copies of the Protected Material, (c) inform the
13 person or persons to whom unauthorized disclosures were made of all the terms of this Order, and
14 (d) request such person or persons to execute the "Acknowledgment and Agreement to Be Bound"
15 that is attached hereto as Exhibit A.

16
17 10. FILING PROTECTED MATERIAL. Without written permission from the
18 Designating Party or a court order secured after appropriate notice to all interested persons, a Party
19 may not file in the public record in this action any Protected Material. A Party that seeks to file
20 under seal any Protected Material must comply with Civil Local Rule 79-5.

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22 11. FINAL DISPOSITION. Unless otherwise ordered or agreed in writing by the
23 Producing Party, within sixty days after the final termination of this action, each Receiving Party
24 must return all Protected Material to the Producing Party. As used in this subdivision, "all Protected
25 Material" includes all copies, abstracts, compilations, summaries or any other form of reproducing or
26 capturing any of the Protected Material. With permission in writing from the Designating Party, the
27 Receiving Party may destroy some or all of the Protected Material instead of returning it. Whether
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1 the Protected Material is returned or destroyed, the Receiving Party must submit a written
2 certification to the Producing Party (and, if not the same person or entity, to the Designating Party)
3 by the sixty day deadline that identifies (by category, where appropriate) all the Protected Material
4 that was returned or destroyed and that affirms that the Receiving Party has not retained any copies,
5 abstracts, compilations, summaries or other forms of reproducing or capturing any of the Protected
6 Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all
7 pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney work product,
8 even if such materials contain Protected Material. Any such archival copies that contain or constitute
9 Protected Material remain subject to this Protective Order as set forth in Section 4 (DURATION),
10 above.

11
12 12. MISCELLANEOUS

13 12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek
14 its modification by the Court in the future.

15 12.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order
16 no Party waives any right it otherwise would have to object to disclosing or producing any
17 information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no
18 Party waives any right to object on any ground to use in evidence of any of the material covered by
19 this Protective Order.

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD

Dated: _____

Attorneys for Plaintiff

Dated: _____

Attorneys for Defendant

PURSUANT TO STIPULATION, IT IS SO ORDERED

9/4/09

Dated: _____



District Judge Claudia Wilken

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
_____ [print or type full address], declare under penalty of
perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued
by the United States District Court for the Northern District of California on [date] in the case of
Smugmug, Inc. v. Virtual Photo Store LLC, dba VPS, LLC, Case No. 09-cv-02255 CW. I agree to
comply with and to be bound by all the terms of this Stipulated Protective Order and I understand
and acknowledge that failure to so comply could expose me to sanctions and punishment in the
nature of contempt. I solemnly promise that I will not disclose in any manner any information or
item that is subject to this Stipulated Protective Order to any person or entity except in strict
compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the
Northern District of California for the purpose of enforcing the terms of this Stipulated Protective
Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of
_____ [print or type full address and telephone number] as
my California agent for service of process in connection with this action or any proceedings related
to enforcement of this Stipulated Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____